McClain of Georgia, Inc. *and* Shopmen's Local Union No. 616, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO. Cases 10–CA–28231–3, 10–CA–28422, 10–CA–28526, 10–CA–28628, and 10–RC–14578

October 17, 1996

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On April 26, 1996, Administrative Law Judge Philip P. McCleod issued the attached decision. Thereafter, the Respondent filed exceptions and a supporting brief, the General Counsel filed and later withdrew cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified and set forth in full below.[4]

[1] On July 22, 1996, the General Counsel filed a Motion to Withdraw Cross-Exceptions. The General Counsel's motion is granted.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We agree with the judge's finding that employee Aric Evans is not a supervisor because the record fails to establish that his duties, including assignment of work, involved the exercise of independent judgment within the meaning of Sec. 2(11) of the Act.

[4] Because the Respondent engaged in egregious and widespread misconduct, we find it necessary to issue a broad cease-and-desist order. The Respondent made numerous threats of plant closure, engaged in repeated interrogations of employees, and solicited employees to spy on each other's union activities in violation of Sec. 8(a)(1), and made numerous changes in working conditions and laid off employees in violation of Sec. 8(a)(3). Accordingly, we shall require the Respondent to cease and desist from the violations found and from infringing in any other manner on the rights guaranteed employees by Sec. 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

In addition, we shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

The judge failed to order the Respondent to remove from its files any reference to the unlawful warnings to employees, and the judge failed to order a make-whole remedy for the employees affected by the Respondent's unlawful change in its recall policy. We shall modify the recommended Order accordingly.

ORDER

The National Labor Relations Board orders that the Respondent, McClain of Georgia, Inc., Macon, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union sympathies and the sympathies of other employees.

(b) Threatening employees with plant closure if they select Shopmen's Local Union No. 616, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO (the Union), or any other labor organization, to represent them.

(c) Soliciting employees to spy on the union activities of other employees.

(d) Soliciting grievances from employees, promising benefits to employees in return for opposing the Union, and granting employees various benefits to dissuade them from supporting the Union.

(e) Ordering warnings to be issued to employees, and issuing such warnings, in retaliation for their union activity.

(f) Laying off employees to retaliate against them because of their support for the Union.

(g) Requiring every employee in the plant to submit simultaneously to a drug screen in order to retaliate against the employees because of their support of the Union.

(h) Changing its previous practice of allowing retests when an employee tests positive for drugs in order to retaliate against employees because of their support of the Union.

(i) Changing its recall policy with regard to retaining seniority for purposes of qualifying for fringe benefits, changing its evaluation procedures, and instituting new and stricter attendance policies in order to retaliate against employees because of their support of the Union.

(j) Converting Aric Evans from hourly to salaried status in order to remove Evans from the status of an employee protected by the Act, soliciting Evans to commit unfair labor practices, imposing more onerous working conditions and job duties on Evans, and discharging Evans, or any other employee, for engaging in union activities or for refusing to commit unfair labor practices.

(k) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer the laid-off employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

(b) Within 14 days from the date of this Order, offer Kenneth Swayne, Anthony Farlee, Glen Fordham, Wilbert McGuire, Dennis Scruggs, Terry Scruggs, Eugene Smith, Lawrence Trice, and other employees discharged or terminated as a result of the Respondent's changes in its previous practice of allowing retests after an employee tests positive for drugs, and employees discharged or terminated as a result of the Respondent's requiring every employee in the plant to submit simultaneously to a drug screen, to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority rights or privileges previously enjoyed.

(c) Within 14 days from the date of this Order, offer the employees discharged or terminated by the Respondent as a result of the changes in evaluation procedures and institution of new and stricter attendance policies, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority rights or privileges previously enjoyed.

(d) Within 14 days from the date of this Order, offer Aric Evans full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

(e) Make whole Aric Evans, Kenneth Swayne, Anthony Farlee, Glen Fordham, Wilbert McGuire, Dennis Scruggs, Terry Scruggs, Eugene Smith, Lawrence Trice, and other unnamed individuals referred to in paragraphs (a) through (d) above, for any loss of earnings or other benefits they may have suffered by reason of the discrimination against them by paying them a sum of money equal to the amount they would have earned from the date of the discrimination to the date of the Respondent's offer of reinstatement, less net interim earnings, with backpay to be computed in the manner proscribed in *F. W. Woolworth, Co.*, 90 NLRB 289 (1950), plus interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(f) Make whole any employees denied fringe benefits because of the changes in recall policy with regard to retaining seniority for the purposes of qualifying for fringe benefits. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 182 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, supra.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warnings and discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the warnings and discharges will not be used against them in any way.

(h) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its Macon, Georgia facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since February 10, 1995.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

DIRECTION

It is directed that, within 14 days from the date of this Decision, Order, and Direction, the challenged ballots of Dennis Scruggs, Anthony Farlee, Terry Scruggs, Aric Evans, Glenn Fordham, Isaiah Crawford Sr., Duran Jackson, James Weldon, Roy G. Wilson, Andrew Moore, and Larry Coats be opened and counted by the Regional Director and that a revised tally of ballots be issued.

IT IS FURTHER DIRECTED that if the revised tally of ballots reveals that Shopmen's Local Union No. 616, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO (the Petitioner) has received a majority of the valid ballots cast, the Regional Director shall issue a certification of representative. If, however, the revised tally shows that the Petitioner has not received a majority of the ballots cast, the Regional Director shall set aside the election and conduct a new election when he deems the circumstances permit the free choice of a bargaining representative.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate you about your union sympathies and the sympathies of other employees.

WE WILL NOT threaten you with plant closure for selecting Shopmen's Local Union No. 616, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO, or any other labor organization, to represent you.

WE WILL NOT solicit you to spy on the union activities of other employees.

WE WILL NOT solicit your grievances or promise or grant you benefits in return for your opposing and refusing to support the Union.

WE WILL NOT order or issue warnings against you in retaliation for your support for the Union.

WE WILL NOT lay off employees in retaliation for supporting the Union.

WE WILL NOT require all of you to submit simultaneously to a drug screen in order to retaliate against you because of your support for the Union.

WE WILL NOT change our previous practice of allowing retests when an employee tests positive for drugs in order to retaliate against you because of your support for the Union.

WE WILL NOT change our recall policy with regard to retaining seniority for purposes of qualifying for fringe benefits, change our evaluation procedures, or institute new and stricter attendance policies in order to retaliate against you because of your support for the Union.

WE WILL NOT convert you from hourly to salaried status in order to remove you from the status of an employee protected by the Act, solicit you to commit unfair labor practices, impose more onerous working conditions and job duties upon you, or discharge you because you engage in union activities or because you refuse to commit unfair labor practices.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer the laid-off employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

WE WILL, within 14 days from the date of this Order, offer Kenneth Swayne, Anthony Farlee, Glen Fordham, Wilbert McGuire, Dennis Scruggs, Terry Scruggs, Eugene Smith, Lawrence Trice, and other employees discharged or terminated as a result of our changes in our previous practice of allowing retests after an employee tests positive for drugs, and employees discharged or terminated as a result of our requiring you to submit simultaneously to a drug screen, to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of this Order, offer the employees discharged or terminated as a result of our changes in evaluation procedures and institution of new and stricter attendance policies, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of this Order, offer Aric Evans full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL make whole Aric Evans, Kenneth Swayne, Anthony Farlee, Glen Fordham, Wilbert McGuire, Dennis Scruggs, Terry Scruggs, Eugene Smith, Lawrence Trice, and other unnamed individuals that we have discriminated against in the manner set forth above, for any loss of earnings or other benefits they may have suffered by reason of the discrimination against them by paying them a sum of money equal to the amount they would have earned from the date of the discrimination to the date of our offer of reinstatement, less net interim earnings, plus interest.

WE WILL make whole any employees affected by our change in recall policy with regard to retaining seniority for purposes of qualifying for fringe benefits.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges and warnings referred to above, and WE WILL, within 3 days thereafter notify the employees in writing that this has been done and that the

warnings and discharges will not be used against them in any way.

McClain of Georgia, Inc.

Ellen K. Hampton, Esq., for the General Counsel.
Thomas H. Williams, Esq. (Jaffe, Raitt, Heuer & Weiss), for the Respondent.

DECISION

Statement of the Case

Philip P. McLeod, Administrative Law Judge. I heard this case in Macon, Georgia, on October 23 through 26 and October 31 through November 3, 1995. The case originated from a petition filed in Case 10–RC–14578 on January 9, 1995. On February 10, 1995, a charge was filed in Case 10–CA–28231–3. Thereafter, an election was conducted on February 23 in which 18 votes were cast for, and 21 votes cast against, union representation. There were 11 challenged ballots which are sufficient to be determinative of the results of the election. On March 1, the Petitioner filed timely objections to the election. On June 22, 1995, an order directing hearing on objections and challenged ballots issued.

On October 6, 1995, an order consolidating cases, second amended consolidated complaint and notice of hearing issued. The complaint alleges that Respondent violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) by interrogating employees concerning their union activities; promising employees wage increases, promotions, and other benefits if they refrained from engaging in union activities; granting wage increases and other benefits; soliciting employees to report to Respondent the union activities of other employees; threatening employees with reprisals; threatening employees that it would close its plant if they joined, or engaged in, activities on behalf of the Union; threatening its employees with layoffs; converting employee Aric Evans from hourly to salaried status; soliciting Aric Evans to commit unfair labor practices and thereafter imposing more onerous working conditions and job duties on him because he refused to commit the unfair labor practices; discharging Aric Evans; laying off employees; implementing an expanded drug-testing policy; and changing its policies and procedures regarding the seniority and benefits of employees recalled from layoff.

In its answer to the consolidated complaint, Respondent admitted certain allegations, including the filing and serving of the charges; its status as an employer within the meaning of the Act; the status of Shopmen's Local Union No. 616 of the International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO as a labor organization within the meaning of the Act; and the status of certain individuals as supervisors and agents of Respondent within the meaning of Section 2(11) of the Act. Respondent denied having engaged in any conduct which would constitute an unfair labor practice within the meaning of the Act.

At the trial here, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. On January 30, 1996, counsels for the General Counsel and Respondent filed timely briefs which have been duly considered. On the entire record in this case, and from my observation of the witnesses, I make the following

Findings of Fact

I. JURISDICTION

McClain of Georgia, Inc. is a Georgia corporation, with a facility at Macon, Georgia, where it is engaged in the manufacture of solid waste handling equipment and containers. In the regular course and conduct of its business, Respondent annually sells and ships from its facility products valued in excess of $50,000 directly to points located outside the State.

Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Shopmen's Local Union No. 616 of the International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

Kenneth McClain is president, chairman, and chief executive officer of McClain Industries. Under that umbrella, McClain operates at least nine corporations in various States, including McClain of Georgia, McClain of Oklahoma, McClain of Ohio, McClain of Michigan, McClain Easy Pack, Shelby Steel Processing, Quality Steel Tubing, Galion of Ohio, and Quality Products, the last of which is now called McClain Tube and discussed in greater detail here. These corporations manufacture a variety of heavy metal industrial products from solid waste disposal containers to dump trucks. McClain of Georgia, opened in 1987 in Macon, produces containers for solid waste transportation and disposal.

B. *Early Union Activity*

Employees Alfred Phelps and Thomas Booker first started talking about the need for a union to represent Respondent's employees in April or May 1994. Phelps, who had previously been a member of the Ironworkers, had a work station strategically located next to a water fountain, and from which Phelps had many opportunities to engage in conversation with Albert Buckalew concerning unions during the time when Buckalew was assistant plant manager, and later when Buckalew was plant manager from July to September 1994. Phelps and Booker testified credibly that during several conversations, Buckalew repeatedly warned Phelps and Booker, and any other employees present, that McClain would not allow a union to come in and had, in fact, closed a plant in Kalamazoo, Michigan, because of a union. The record here establishes that a McClain facility in Kalamazoo known as Quality Products was closed in the midst of a union campaign and later reopened as McClain Tube. Buckalew admits telling numerous employees in the Macon plant that McClain closed this Kalamazoo facility because of the union campaign.

Phelps testified credibly that during his frequent conversations with Buckalew, Buckalew also stated more than once

that McClain had established an "in house Union" at Respondent's Detroit, Michigan plant. Buckalew explained to Phelps that this "was a Union that the employees worked out a deal with McClain that they would represent themselves, and that way they wouldn't have to have an outside source come in . . . to represent them." Phelps testified credibly that often when Phelps asked why they couldn't have a union represent them in Macon, Buckalew would reply that Phelps "needed to shut up" or he would "make everybody lose their job." Phelps also testified credibly that he and Buckalew engaged in discussions concerning a plant in Galion, Ohio, during which Buckalew told Phelps the employees at the Galion plant already had a union when McClain bought it, and that "McClain was trying to get rid of the Union in Ohio."

C. *McClain Learns of Union Activity*

Employee Lawrence Trice testified credibly that in late August or early September, Kenneth McClain came up to Trice's work line and asked employees if they had heard any rumors of a union being started in the plant. When the employees responded in the negative, McClain told them that he had heard "a rumor that selected people were trying to start a union." He then went on to talk to these employees about how good their benefits were and how a union "would just stir up trouble between the employees." Trice responded he agreed with McClain that they had good benefits and that the shop was too small for a union.

Trice testified that about a week or two later, on or about September 15, McClain returned to Trice's line and told the employees he had definitely found out that "there was a Union being started in this plant." McClain went on to say that "if a Union was started that he could simply just close the plant down, but he wouldn't he able to do it all at one time." He told Trice that "there wasn't a damn thing in the plant that couldn't be unbolted, and loaded on a truck, and transported to another location." I credit Trice that McClain explained moving the plant was against the law, but that "he could slowly phase it out by making people think that the Company was losing money." McClain went on to tell Trice and the other employees to "let everybody know" he could move the Company to another location, because he had had dealings with a union before and would not have a union in his Company. Finally, McClain told these employees not to worry, however, because McClain knew they were against a union. He told them that if he did move the Company, he would make sure they could transfer if they wished.

After talking to this group of employees, McClain called Trice over to the side, praised Trice's work, and told him, "I know your opinions on the Union, and I feel you're on my side." McClain then promised Trice $1-per-hour raise to top pay. Respondent admits that Trice did receive the dollar raise, although it asserts this was done because Trice was such an outstanding worker and was utilized to train other employees. Trice's credible testimony, however, unequivocally links the increase to Trice's agreement with McClain on the union issue. In fact, 25 cents of the amount received was due in any case as an across-the-board cost-of-living increase, but I find that the rest of the raise was motivated by McClain's desire to reward Trice for his antiunion position.

For reasons which apparently have nothing to do with this proceeding, Plant Manager Buckalew resigned that position in late September 1994. Buckalew, however, continued working for Respondent at the Macon facility. Respondent described Buckalew's position after that as essentially that of a "ghost," which I take to mean Respondent contends that he was rarely seen and had no real presence or authority. The record, however, establishes that Buckalew's presence and authority continued to be real. McClain himself admitted he continued to lean on Buckalew for advice. Further, Buckalew admitted he retained the title supervisor as well as the $2000 raise given him when he became plant manager. Further, the record is clear Buckalew also retained other trappings of managerial privilege, including salaried status, the privilege of driving a company truck to and from work, and gas money. Buckalew also continued to speak to employees about the Union as if he still represented Respondent, as more fully described below. I find that because of his privileged position, duties, continued job title of supervisor, and his personal relationship with Kenneth McClain, Buckalew remained an agent of Respondent, placed in a position where employees would reasonably conclude he spoke for Respondent. *Einhorn Enterprises*, 279 NLRB 576 (1986).

D. *Union Activity Intensifies*

When Buckalew resigned as plant manager, Ken Cole took over the position. Cole remained in that position only a short time, and was replaced by Neil Flowers. Flowers remained as plant manager throughout the trial here.

Immediately prior to October 12, the supervisory structure included Aric Evans and Timothy Hall, among others. Though he carried neither the title, nor the salaried position, nor other perquisites of Respondent's management, Evans, who is black, had become the unofficial assistant plant manager. Hall, who is white, was a leadman. On October 12, 1994, an incident occurred at Respondent's facility which had significant impact on this case. Exactly what gave rise to this incident is still not altogether clear from the record and in reality matters little. Whatever it was, the credible evidence shows that Hall became irate, stormed through Respondent's plant, through the office, and out the door screaming that he "would not work for" or "would not take orders from a nigger."

Hall admits becoming angry and leaving. According to Hall, he "cussed all the way out the door" and said, "I'm not working for anybody as stupid as Aric Evans," but denies calling Evans a "nigger." In fact, Hall claims he has never—ever in his life—even used the word. Numerous employees and ex-employees who have worked with Hall testified credibly to the contrary, both as to Hall's general denial and with regard to the incident on October 12. Even Buckalew, who first testified on direct that Hall did not call Evans a "nigger" during this incident, was forced to admit on cross-examination that Hall had done so, because the admission is contained in a deposition Buckalew gave in a pending related race discrimination case.

It is undisputed that 2 or 3 hours later, Kenneth McClain personally sent another employee to bring Hall back to the plant. To say that McClain did not want Hall to quit is a gross understatement. McClain himself testified:

> [W]hen Tim [Hall] walked out and left me on the intermodal line, it left me right in the hole. I (had) no one that knows anything about it. *I was quite frankly pan-*

icked. I would have agreed to anything to get the man to come back to work for me to help get the plant back in stream. [Emphasis added.]

McClain met with Hall, at which time McClain admits he made Hall various promises in order to get Hall to come back to work. At the time, Respondent was planning to open a new facility in Houston, Texas. One of the promises McClain made was that Hall would begin training immediately to become plant manager when that facility opened. Hall admits that he became salaried as of that meeting. Other things McClain may have promised Hall may never be known, but later events certainly suggest what they were. After the meeting between Hall and McClain, McClain met with Hall and Evans. Evans testified credibly that in this meeting, McClain told Evans that he "was going to put Tim Hall over me." Evans also testified credibly that in various conversations with McClain shortly thereafter, McClain told Evans repeatedly that he "wasn't shit in the shop." This testimony is made all the more credible by other events which took place on October 12 as more fully described below.

After McClain met with Evans and Hall, McClain met with certain other employees at the facility, including leadmen. Aric Evans has at least three nephews who work for Respondent, Milton Craig, Cedric Craig, and Lance Craig. All were invited to this meeting with McClain. All attended, and all testified credibly regarding the meeting. Milton Craig testified McClain stated he had made a decision to make Tim Hall plant manager. Lance Craig testified that McClain asked if anyone would have a problem working with Tim Hall. Milton testified that Cedric stated he did not agree with the decision—that Aric Evans had more experience than Hall, and Hall had quit several times and been rehired.

Cedric Craig offered an equally credible but somewhat more complete account of the meeting. Cedric Craig testified that in this meeting, McClain stated that Ken Cole was "plant manager—in the office" and Neil Flowers was "plant manager." McClain then stated that Tim Hall would be assisting Flowers and training to be plant manager at the new Texas facility. Cedric Craig, a leadman, testified credibly that McClain then stated Aric Evans "would be assisting Cedric . . . in getting parts."

Milton Craig testified with particular candor about a would-be joke McClain told in this meeting to illustrate and emphasize various people's position in Respondent's hierarchy. The "joke" was that these various people were represented by various body parts, which McClain articulated in detail. The "joke" ended with McClain comparing Aric Evans to an anus.

The next day, October 13, the Union held its first meeting with employees, at which time numerous employees, including Aric Evans, signed authorization cards.

E. *The Union's First Petition and Respondent's Reaction*

Along with Alfred Phelps, Thomas Booker was an early union supporter who was instrumental in starting the organizing campaign. Booker testified credibly that in late October, at a time when employees were still attempting to keep their organizing activity secret, Kenneth McClain approached Booker while Booker was working in the yard, and McClain asked Booker if he knew anything about the Union. Because employees were attempting to keep their organizing activity secret, Booker told McClain he knew nothing about the Union.

Lawrence Trice testified credibly that in early November 1994 he and employee Keenan Castleberry were asked by Plant-Manager-in-Training Tim Hall if they wanted to drive over and see who supported the Union by seeing who was at a union meeting. Hall then let them off scheduled overtime work for this purpose. Trice testified credibly they did as Hall asked, and the next day when Hall wanted to know who had attended, Castleberry read off the list of names they had recorded. Hall denied having solicited employees to report on a union meeting. Hall was wholly incredible on this and many other points. Keenan Castleberry was also called by Respondent and denied he had been solicited by Hall to spy on this union meeting. I found Castleberry a very reluctant witness. Castleberry, for example, even denied that Buckalew ever told employees McClain would close the Macon facility before he would let it go union—a point which even Buckalew admits! As Respondent's counsel questioned Castleberry, I noticed that the questions were far too carefully tailored, and when I questioned Castleberry myself, he ended up corroborating Trice's testimony that they drove to the union meeting. I credit Trice entirely regarding this incident.

On November 3, the Union filed its first petition, in Case 10–RC–14566, seeking to represent Respondent's production and maintenance employees. Unfortunately, along with the petition, the Board's Regional Office also served on Respondent as an attachment the list of employees' names who had signed authorization cards, which had been submitted by the Union in support of its petition. Aric Evans' name was on this list along with 22 other card signers. McClain asserted that he first became aware of union activity when he received this petition in the mail. Based on the credited testimony of Trice and Booker described above, I do not credit McClain's assertion that receipt of the petition was his first knowledge of union activity at the Macon facility, though I have no doubt that receipt of the list of card signers helped considerably in knowing which employees were involved.

In November 1994, McClain started having meetings with groups of employees to discuss the union issue. Employees Thomas Booker and Lawrence Trice testified credibly that in one of the earliest of these meetings, held outside the front office, McClain told the assembled employees he had heard that one of the reasons employees wanted a union was because of problems with management. Trice testified credibly McClain stated that employees didn't need a union—that he could take care of their problems. Booker testified credibly McClain also stated, "If you are dissatisfied, why didn't you let me know?" As a result, employees started expressing their need for a better breakroom, a refrigerator, an ice cooler, a microwave, and similar items. Booker and Trice testified credibly that employees got everything they asked for in this meeting. McClain then told employees that if they had other requests, there was a suggestion box in the breakroom.

On or about November 7, former Plant Manager Buckalew, along with Aric Evans and five other employees, started a night shift. Evans testified that he was asked to go on this shift by McClain. McClain and Buckalew testified Evans volunteered, because Buckalew and Evans were close

friends and Evans wanted to work with his friend. In any event, Evans' testimony is uncontroverted that on or about November 14, after being on night shift only a week, Plant Manager Flowers approached Evans and asked him to come back to work on the day shift. Evans declined, stating that McClain had personally assigned him to nights. The next day, Ken Cole approached Evans and made the same request, adding that McClain wanted it. Evans again declined, saying that if McClain wanted Evans on days, let McClain ask him. The next day, Cole again approached Evans and told Evans that McClain had said if Evans did not come back to work on the day shift that next Monday, McClain would fire Evans.

Evans reported for work on the day shift that next Monday. The record is abundantly clear from the testimony of both Evans and McClain that this incident irritated McClain so much he seriously considered discharging Evans. McClain told Evans to leave the plant and to come back later that day to find out whether or not his employment was terminated. When Evans returned, McClain shook his hand, told Evans he was a good man and there were people in the plant who wanted to work with him, and therefore he was not fired. Evans was assigned to making sure that the plant had sufficient steel and raw materials.

Respondent argues that throughout the time relevant to this case, including while on night shift and on his return to the day shift, Evans was a supervisor within the meaning of the Act. The record convinces me that whatever may have been expected from Evans in spurring productivity, he was no longer a supervisor within the meaning of the Act after Hall was made plant-manager-in-training. The night shift consisted of only seven people, one of whom was former Plant Manager Buckalew, who was still a supervisor. According to Respondent's own position, it did not ask Evans to go onto that shift, but rather Evans volunteered. I am convinced that Evans' own description of his duties at any given time are somewhat inflated due to the natural tendency most people have to see their job as important, and due to the fact Evans unquestionably played a big role in spurring productivity at Respondent's facility. If Respondent did not ask Evans to go on night shift, but it clearly did ask former Plant Manager Buckalew, given the fact there were only six other people on the shift, there is simply no reason to believe anyone other than Buckalew actually possessed any supervisory authority.

Respondent argues that when Evans was returned to the day shift, he was placed in a supervisory capacity "in charge of the machine shop." Plant Manager Flowers himself testified, however, that McClain wanted Evans back on the day shift to "keep track of steel" and "help Cedric." Cedric is Evans' nephew and himself only a leadman. Further, Flowers testified that the day Evans returned to the day shift and McClain sent Evans home while he considered firing Evans, McClain asked Flowers "if Evans was worth saving to the plant." It was only because Flowers and other employees supported Evans that he was retained at all. This is clear even from the testimony of Plant-Manager-in-Training Tim Hall, who testified Flowers asked McClain to "let me handle him." I conclude that while Evans may indeed have been uniquely capable of helping other employees spur productivity, Evans actually possessed no supervisory authority within the meaning of the Act. Whatever may have been Evans' role in spurring productivity among other employees, I find that it was as nothing more than a leadman. McClain had indeed revealed his own view of Evans in the tasteless off-colored "joke" in which he equated Evans with an anus, which may facilitate product moving through the system but which has no control over how it gets there.

Larry Coats, Duran Jackson, and George Brown were among the small group of employees who made up a second shift at the Macon facility. Coats testified credibly that in early November, at a time when Coats had not expressed any support for the Union or even signed a union authorization card, Kenneth McClain approached Coats and questioned him about "why did we need a Union." Coats replied that he did not know, and the conversation terminated. McClain does not deny questioning Coats, and in fact admits questioning many employees about their support for the Union.

Employee Thomas Booker testified that in mid-November 1994, Kenneth McClain approached him and initiated a conversation about the Union. Booker testified credibly that during this conversation, McClain stated, "[H]e would shut the place down if the Union were to come in, he would shut the place down." Booker was candid in admitting that McClain cloaked this remark as it were a joke, as Booker put it with "a twenty-five cent smile."[1]

On November 18, a hearing was held in Case 10–RC–14566. Respondent argued that the unit petitioned for was not appropriate, and that the only appropriate unit should include a group of "temporary employees" employed by Image temporary services who were in effect probationary employees of Respondent. During this hearing on November 18, Ken Cole testified, inter alia, that certain people made up the management employees, including Aric Evans as assistant plant manager. On the basis of that testimony, the hearing officer asked for and received a stipulation from the Union that these individuals, including Evans, were supervisors within the meaning of the Act. I note that this stipulation was asked for and received on the basis of Cole's characterization of Evans as assistant plant manager and without any record testimony actually describing any of Evans' duties. Not only is this stipulation not binding on me, but under these particular circumstances it is also of very little significance.

November 22 was an eventful day at Respondent's facility. Aric Evans testified that while he was working, Kenneth McClain approached and started a conversation about the Union. Evans testified credibly that McClain approached Evans and told him "he wouldn't have a Union in his fucking shop," that nobody was going to tell him what to do in his shop and that "if you think I'm nasty now, just wait. I'll show you. You haven't begun to see nasty." McClain asked Evans to talk to his "mediator." Evans asked what that was. McClain then told Evans his lawyer was coming in, and McClain wanted Evans to talk to him. Soon thereafter, Thomas Williams, Respondent's counsel, came in and was introduced to Evans. McClain left Evans and Williams alone together in an office. Williams does not dispute Evans' version of what took place.

Counsel questioned Evans about what started the Union, and Evans offered his opinion in terms that made his sym-

[1] In her posttrial brief, counsel for the General Counsel moves to correct the transcript in certain particulars. No opposition having been filed by Respondent, those motions are granted.

pathies clear. Counsel then told Evans that he could not have anything to do with the Union, because Evans was assistant plant manager. Evans denied that he held any supervisory position, and pointed out that unlike supervisors, including Tim Hall, he was hourly rather than salaried. Evans even pointed out McClain's specific remark that Evans "wasn't shit." Nevertheless, Williams insisted that Evans was management and persisted in questioning him about the union activity among employees, including specific employees such as Thomas Booker.

Aric Evans testified credibly that after the meeting with Respondent's counsel, Kenneth McClain approached Office Manager Sara Kitchens and Evans. McClain told Kitchens that she was to prepare disciplinary warnings, based on employees' past time records, for all employees who had violated company attendance policies. McClain instructed Evans that it was his job to issue these warnings to the various employees whom Kitchens wrote up. Later that afternoon, the warnings had been prepared, and Evans did as instructed. The exact order of events that afternoon is impossible to reconstruct, but among employees issued warnings were Robbie Swayne, a prounion supporter, and Lawrence Trice, who had expressed his antiunion sentiments directly to McClain as described above.

At about that time, Trice was due to transfer to the McClain payroll from the Image temporary payroll and receive insurance benefits. Plant-Manager-in-Training Hall alarmed Trice by announcing in a meeting with employees that raises and promotions would be frozen until some matters relating to the Union were straightened out. Hall agreed to go to the office on Trice's behalf. When Trice was called to the office shortly thereafter, however, he was given the written reprimand by Aric Evans for past tardiness. Trice angrily refused to sign, tore up his copy, and sought out Hall. Hall said he would take care of it, and he did so, returning with the original which he then tore into pieces. Later, before Trice went home that day, McClain approached Trice and apologized for the writeup. McClain told Trice, "I had to go through everybody' s records . . . because we have to make the Union think we're going strictly by company policy." He told Trice that they had been lenient, but that now that "things are all stirred up, we have to go strictly by policy." Before McClain could say more, however, his counsel grabbed McClain's arm and took him to the side to talk. When McClain returned to Trice, McClain told Trice he could not say any more but not to worry, that Trice would be on the company insurance the following week.

On that same day, Robbie Swayne was also called to the office. Swayne had signed a union authorization card and his name was on the list attached to the petition served on Respondent. McClain told Swayne he would not receive a raise due at that time because of his attendance record. Swayne testified credibly that McClain and his counsel proceeded to argue in Swayne's presence about whether Respondent could depart from past practice concerning raises on the advent of the union campaign. Swayne was then asked to leave, which he did. Later the same day, Swayne was called back to the office and given the written warning by Aric Evans for past times he was tardy. Still later that afternoon, however, Swayne was stopped by McClain and his counsel, at which time the warning was rescinded. McClain told Swayne he would get his raise after all. When Swayne tried to thank McClain and shake his hand, McClain just looked at Swayne, refusing to take his hand.

F. *Events of December 1994*

Evans testified credibly that right after the meeting between him and Respondent's counsel, described above, Evans was made an inventory clerk, ordering needed parts and supplies, and keeping track of such items on the computer in Respondent's office. Evans also testified credibly that McClain told him the only thing Evans was responsible for was making sure the men had all the parts they needed.

On December 1, about a week to 10 days after that meeting with Respondent's counsel, McClain approached Evans and told him that he was putting Evans on salary. McClain stated Evans would receive $32,000 per year. Evans protested and told McClain he had already made $34,000 that year because of extensive overtime. McClain responded, cursing that he was putting Evans on salary at $35,000—and that was that.

It is undisputed that during December 1994, McClain held meetings with employees to discuss the Union. Several employees testified credibly and without contradiction concerning statements made by McClain during these meetings. Employee George Brown testified that in a meeting he attended, McClain "said if the Union came in, the production would go down because there would be so much bickering and fighting amongst the employees." McClain warned that friends would become enemies, and enemies become more enemies, and that this would cause a lack of work.

Duran Jackson testified that in a meeting he attended, McClain warned that friends would no longer be friends, that McClain could not afford a union, and that if a union did come in, the plant "could close and pack up." Similarly, Larry Coats testified that in one of the evening meetings McClain held for employees on second shift, McClain stated he would "bring us more work out here to do and that we didn't need a Union, but if a Union came in that the work would get light and that we would have a lay off." Additionally, he warned that friends would turn against each other and could end up arguing and getting in fights, and that "if that would happen, you know, we will close the plant."

Also in December 1994, Milton Craig stopped Plant-Manager-in-Training Tim Hall as he walked through the department and told Hall there were a lot of employees that think the plant would close if the Union got voted in. Craig testified credibly Hall replied, "Yes, McClain said he is going to close the plant if the Union gets voted in."

McClain and Hall were not the only ones talking to employees about what would happen if employees voted in the Union. Thomas Walker testified credibly that during this same time frame, he heard Buckalew tell "a crowd" of employees "that McClain would close the plant if a Union got in." Despite some equivocation, Buckalew admitted telling employees during this time period about the closure of the Kalamazoo plant, and that what happened in Macon would be up to McClain. Walker and other employees testified even though he was no longer plant manager, Buckalew continued to be a part of management and exercised supervisory authority. As I have found above, because of his indicia of managerial status and privileged position, Buckalew remained an agent of Respondent, placed in a position where

employees would reasonably conclude he spoke for Respondent.

Two other events took place in December 1994 which have particular significance to this case. On December 21, 1994, a Decision and Order issued in Case 10–RC–14566 which found that the appropriate collective-bargaining unit at the Macon facility must include Image temporary employees. As the Union had stated that it did not wish to proceed to an election if the unit petitioned for was not appropriate, the petition was dismissed.

Respondent closed the Macon facility for the week between Christmas 1994 and New Year's 1995. Before employees were let go, McClain held a series of meetings. Lawrence Trice testified credibly that McClain held meetings both right before and right after this break. According to Trice, who I credit, there were rumors about a possible layoff, and McClain told everyone in the meeting before Christmas that there was not going to be a layoff. Robbie Swayne also testified credibly that in the meeting before Christmas, McClain told the employees there would not be a layoff, and that if necessary, "We would take, I think he said, $1,000,000 and stock the yard if that's what it came to."

G. *Events of January 1995*

Soon after employees returned to work, McClain held another series of meetings. According to Trice's credible testimony, McClain again told everyone in the meeting right after the break that there were not going to be any layoffs. McClain told employees that some work was slowing down, and as a result overtime would be cut back and some employees would be cut back to working just 8 hours per day, but there would be no layoffs. McClain assured employees that if necessary, work could be pulled from other plants in order to keep everybody working. Finally, McClain told employees that if all else failed, "we would stock pile stuff in the yard just to keep people working."

Employee Alfred PheIps corroborates Trice. Phelps testified that in the meeting he attended, McClain said that while things were slow, no one would get laid off. McClain stated that if necessary he would take money out of his own pocket and buy materials so he could keep work in stock, thereby avoiding a layoff. Phelps also testified credibly McClain talked about moving work from other plants to Macon, if necessary, including specifically the production of "sludge bodies" from the Galion Company of Ohio to McClain of Georgia. Thomas Booker corroborates both Trice and Phelps. Booker testified credibly that in the meeting he attended in early January, McClain told employees there would not any layoff and that he would "stock pile the yard" if necessary to avoid one.

Other employees testified credibly to identical or similar remarks by McClain, including Pleas Murrel, Milton Craig, and Duran Jackson. According to Craig, whom I found to be particularly straightforward, McClain said the workload had decreased and as a result the work schedule would be reduced from 10 to 8 hours per day. Craig also recalls that McClain said containers would he "stock piled in the yard—that employees were his foremost concern, his number one interest, and that he wasn't going to lay off." Similarly, Duran Jackson testified that McClain said that he wouldn't lay anyone off, especially in the cold winter.

On January 9, 1995, a second petition was filed by the Union in Case 10–RC–14578, adding the temporary service employees to the unit. This petition was received in Respondent's Macon office on Thursday, January 12, 1995.

On Monday, January 16, employee Kenneth Swayne found when he reported to work that his timecard had been pulled and was in the personnel office. At about 8:15 a.m., Plant-Manager-in-Training Hall approached and explained that Swayne had failed a drug test given to all employees when they transfer from the Image temporary payroll to the McClain payroll at the end of a probationary period. According to Swayne's credible testimony, Hall told him, "We'll send you back for another test." Soon thereafter, however, Kenneth McClain and Office Manager Sara Kitchens walked by, and Kitchens pointed out Swayne as the one who had flunked the drug test. McClain angrily vetoed Swayne being sent for another test, saying, "I don't give a fuck. . . . I don't do drugs and I ain't gonna let nobody who does [work here]." Swayne denied ever using drugs. Both Aric Evans and Al Buckalew told Swayne to go home and come back later in order to give McClain time to cool off. As Swayne was leaving, Plant Manager Flowers, Plant-Manager-in-Training Hall, and Swayne all talked to McClain to persuade him to allow retesting. McClain refused, and Swayne was discharged.

Aric Evans testified credibly that when he arrived at work on Wednesday, January 18, he overheard McClain cursing loudly and stating that he was having a layoff and that he was getting rid of people in the shop. Evans testified that as he attempted to walk through the office, McClain stopped him and said, "God damn it Aric, did you hear me . . . . I'm getting rid of the people in the shop. I'm going to show them who is boss around here. I'm going to show them who they're fucking with . . . ." I credit Evans. Leadman Cedric Craig testified credibly that he also overheard McClain. Craig described overhearing a conversation McClain was having with Plant Manager Flowers, Buckalew, and others, in which McClain said, "I don't give a fuck. I'll show their asses." Finally, Thomas Booker testified credibly that he too heard McClain saying in an angry and loud voice that he would lay off employees.

McClain then called all the employees together in a general meeting to announce there was going to be an immediate layoff. Evans testified credibly that in this meeting, McClain told employees how sorry he was that a layoff was necessary, and that the layoff hurt him more than it did them. Evans testified that as soon as the meeting was over, McClain, Evans, and perhaps others returned to the office, at which point McClain asked, "Would I make a good politician?"

Several employees testified credibly to McClains' remarks at the meeting concerning the length of the layoff and the possibility of laid-off employees being recalled. None of them agrees with McClain, who asserts he told employees he did not see any chance of laid-off employees getting their jobs back. I do not credit McClain. Lawrence Trice testified that McClain stated the layoff would last about 2 to 4 weeks. Alfred Phelps testified McClain stated that anybody laid off would be called back as soon as work picked back up. I have no doubt this is what McClain told employees, and I credit both Trice and Phelps.

Tim Hall testified that after McClain made the decision to lay off employees, he and McClain argued over the procedure to use for the layoff. Respondent argues in its posttrial brief that it was this argument which Evans, Cedric Craig, and Thomas Booker overheard when McClain was screaming and cursing the morning of the layoff. I have no doubt an argument did take place between McClain and Hall, but I do not agree with Respondent this is what Evans, Craig, and Booker were describing. I find that McClain's argument with Hall was independent of his other remarks. Hall wanted to simply retain the best people. McClain decided that Image employees should be laid off before anyone employed by McClain of Georgia, and that McClain of Georgia employees in their first 90 days should go before any other McClain of Georgia employees. This was essentially the procedure used, although there were exceptions. Elijah Schinholster, employed directly on the McClain payroll, was laid off, while Image temporary employee Dennis Scruggs was not. Robert Jergenson, also employed directly by McClain, was laid off, while Allen King, an Image temporary, was not.

Aric Evans testified credibly that just a few minutes after announcing the layoff, McClain approached Evans privately in the office. McClain told Evans that he wanted Evans to go out on the floor and tell the people who supported the Union, "I will close the doors and I advise you let them know I'm not playing—I don't play games . . . I will." McClain told Evans, "You can tell them in your own way." McClain then continued, "That's what happened in Kalamazoo . . . better check the records . . . I won't have nobody tell me how to run my business." Evans testified that as McClain was saying this, "I was shaking my head, no, I wasn't going to do it."

Evans testified credibly that the following day, Plant Manager Flowers and Plant-Manager-in-Training Hall had a meeting with all supervisors and leadmen. Evans was not invited. Evans also testified credibly that in mid-January, McClain had all the locks changed at the Macon facility. Supervisors, including Al Buckalew, all got keys to the new locks, but Evans did not. Finally, Evans testified credibly about a conversation which Kenneth McClain initiated with him about that same time, about a week after the layoff, concerning the Union. McClain telephoned Evans and asked whether Evans thought that employee union morale was still strong. Evans replied yes, that support for the Union had not changed, and people still wanted the Union. McClain then said that with Neil Flowers and Tim Hall both gone at that time, "I guess you're in charge." Evans replied, "No, Sir, I don't know anything about it." McClain repeated, "Well, I guess you're in charge," and hung up.

Respondent argues that when employees returned to work in January after the Christmas layoff, Aric Evans was placed "in charge" of the floor. The record shows that at least for a short time, some of his duties included assigning work to other employees. The vast majority of these duties were of a leadman nature, however, including hands-on work showing others how to do certain things. About a week after the phone conversation between McClain and Evans described in the preceding paragraph, however, McClain again changed Evans' duties. McClain approached Evans and told him he had a job he wanted Evans to do. McClain then stated that he wanted the whole plant cleaned up—the shop as well as the yard. McClain told Evans that if he did not have the whole job done in 2 weeks, Evans "ass would be out the door." Evans replied that he would have to take some people off the line to get the job done in time. McClain responded that Evans could not do so—that he had to do the job at night and only with volunteers. Evans was able to get five or six people to volunteer to help him, and together they got the job done.

H. *Events of February 1995*

On or about February 1, 1995, Respondent instituted a new drug screening policy. Prior to that time, Respondent had required new employees to sign drug-testing consent forms. It, however, routinely tested employees only when they completed the probationary period on the Image temporary payroll and were being placed on the McClain of Georgia payroll. Further, the record shows that prior to February 1, when an employee failed a drug screen test, they were routinely allowed to take a retest, and if they passed the retest, no adverse action was taken. This conclusion is supported by credible testimony of Aric Evans and employees such as James Walker, who actually experienced such retests. In late January or early February, McClain decided to subject every employee in the plant to a drug screen—and to impose a zero-tolerance policy whereby anyone who tested positive was immediately discharged, with no retest allowed.

The record shows that prior to February 1, McClain was rather tolerant of allowing employees to overcome both drug and alcohol problems. Cedric Craig testified credibly about one individual, Terry Dukes, who came to work drunk on several occasions. Craig testified that Kenneth McClain told him he had given Dukes 90 days to clean up his drinking problems. At the end of that period, McClain took Dukes for another test, and he failed that test. Only then did McClain terminate Dukes. Regarding another incident, Thomas Booker testified credibly he was told by Al Buckalew that Plant Manager Flowers was using drugs (marijuana) at one time, and that McClain gave him a chance to straighten up. Both of these incidents are given credence by the testimony of Wanda McDonald concerning her own situation. McDonald, who had at one time been employed by Respondent as office manager, testified credibly that during her employment she voluntarily entered a drug rehabilitation clinic. McDonald testified that this was not only known to Kenneth McClain, but that he continued McDonald's pay while she was in the clinic.

Respondent does not dispute that a decision was made to drug test all employees—or that a no-tolerance policy was instituted, for which very few exceptions were made. The record is clear that from the date the second petition was filed on January 9, no retests were allowed beginning with Kenneth Swayne on January 16. Be that as it may, Respondent claims that the immediate precipitous events which gave rise to this change occurred in late January, when an Image employee about to be transferred to the McClain payroll was sent for a drug screen which reported positive for "cannabinoid." By Respondent's own version, no retest was scheduled in this case either, and this employee was discharged. According to Respondent, as the employee was being discharged, he remarked to Plant Manager Flowers that he had not stopped using the drug in time to avoid the positive results. Flowers told McClain about this remark.

McClain told Flowers that he wondered how many others then working might test positive. Flowers suggested that if McClain wanted to find out, "send some" for a drug test. McClain decided to send all employees on the Image temporary payroll for a test, then changed his mind and decided to send every employee on both payrolls, including production employees, the office staff, and supervision. Every employee who tested positive for any drug, regardless of the amount, was immediately discharged, with no one being allowed a retest. As a result, seven employees were discharged, including Anthony Farlee, Glen Fordham, Wilbert McGuire, Dennis Scruggs, Terry Scruggs, Eugene Smith, and Lawrence Trice.

Thereafter, Respondent continued its no-tolerance policy, although not with the same consistency. After the initial sweep, the discriminatory use of drug testing continued. Union supporter Glen Norwood was ordered to take a drug test simply because he had his lungs tested. Norwood was given no second chance when the test was positive. Employee Gene Wilson, on the other hand, not known as a union supporter, was given a second chance when he first tested positive, consistent with Respondent' s practice before the union campaign. Both counsel for the General Counsel and Respondent introduced evidence showing that some of the people discharged pursuant to the no-tolerance policy were known union supporters, while others showed no support for the Union. I find this evidence to be largely irrelevant. The complaint alleges, and I find, that McClain's change in the drug policy was an act of retaliation because of employees' continued support for the Union. Therefore, the union sentiments of specific individuals affected by McClain's retaliation simply do not matter. Both the Board and the courts have long recognized that in a situation such as this, where a policy or rule is changed in retaliation for union activity by some employees, every individual affected by the changed policy is discriminated against, regardless of their individual union sentiments. This is not to say, however, that individual's union sentiments did not play some role in their terminations. Lawrence Trice testified credibly that he overheard Plant-Manager-in-Training Tim Hall tell Dennis Scruggs immediately after he was discharged "not to worry about it," that after 60 or 90 days, after "all this Union stuff blows over," Scruggs could reapply and he would make sure that Scruggs was rehired. Scruggs, however, never returned.

Thomas Walker testified credibly that during February 1995, because of earlier statements made by Buckalew and rumors circulating around the plant, he became concerned as the election approached that Respondent would close the plant if the Union was voted in. Therefore, he went to Plant Manager Flowers seeking assurances that this would not happen. Instead, Flowers told him it was possible that McClain would close the plant if the Union were voted in. This led to Walker submitting his resignation in order to take another job. To forestall his leaving, Plant-Manager-in-Training Tim Hall called Walker to the office the next day and asked him to stay, telling Walker in Flowers' presence that they had called Kenneth McClain, and that McClain said he would give employees 3 weeks' notice if he closed the plant. As a result, Walker decided to stay.

On February 22, the day before the Board-conducted election, McClain discharged Aric Evans. Evans offered an altogether credible account of what took place. McClain called Evans in, demanded his keys to the office, and told Evans he was fired. Evans asked why he was being fired, and McClain responded, "Don't worry about it. Don't worry about it." Evans said, "Don't worry about it? I'm fired. Why are you firing me." McClain answered, "You don't threaten anybody at my property. You don't threaten nobody. You don't threaten to shoot nobody at my property." Evans said, "What?" McClain answered, "That's right. You don't threaten nobody. Just get the hell out. You're fired. You just get on out of here." Evans asked, "Who did I threaten, Mr. McClain? Who am I threatening?" McClain answered, "Don't worry about it. Don't worry about it. Just get on out of here." Evans testified credibly that as he was leaving and got to the door, McClain stated, "And I know you're the reason this shit is in my shop." Evans then proceeded to leave. As he did so, McClain told Evans that he might call him back. Evans replied, "Well am I fired or not?" McClain retorted, "Yeah, you're fired. Get the fuck out of my shop."

As Evans was leaving, he asked Plant Manager Flowers why he was being fired. Flowers shrugged his shoulders and stated that this was the first he had heard about it and he didn't know anything about it. Evans left.

On February 23, the Board-conducted election brought no final resolution. Respondent had not put the names of employees laid off on January 18 on the "*Excelsior* list" of employees eligible to vote. As a result, 10 laid-off employees who came to vote were challenged by the Board agent conducting the election. These challenges were determinative of the results. Thereafter, the Union filed objections to the election.

I. *Changes in Recall Policy and Other Procedures*

For some, the January 18 layoff did not last long. Elijah Schinholster was rehired on January 23, 1995. Duran Jackson was rehired February 6, 1995. After the election, a question arose about how these employees recalled from the January layoff were going to be treated with regard to various benefits. Counsel for the General Counsel presented unrefuted evidence that at that time, in about March 1995, Respondent instituted a new policy that employees recalled from layoff, such as Jackson, could not retain their seniority but would have to start over, thus delaying raises and promotions.

The General Counsel also presented unrefuted evidence that Respondent instituted new evaluation procedures for raises in May 1995, and instituted new and stricter attendance rules and policies on or about June 12 and 28 and July 1, 1995, all without notification or bargaining with the Union.

Analysis and Conclusions

From the very inception of union activity at the Macon facility, and continuing throughout this case, Respondent has conveyed an unequivocal message to employees that Kenneth McClain would not tolerate a union and would close the Macon facility before he would allow that to happen. Even before any real union campaign got under way, during the time when Buckalew was assistant plant manager, and later when Buckalew was plant manager from July to September 1994, employees Alfred Phelps and Thomas Booker spoke on several occasions with Buckalew concerning unions.

Phelps and Booker testified credibly that during several conversations, Buckalew repeatedly warned Phelps, Booker, and other employees present that McClain would not allow a union to come in and had, in fact, closed a plant in Kalamazoo, Michigan, because of a union. Phelps testified credibly that when he asked why they couldn't have a union represent them in Macon, Buckalew replied that Phelps "needed to shut up" or he would "make everybody lose their job." Given the number of conversations between Buckalew, Phelps, and Booker, it is probable that some took place within the 10(b) statute of limitations period proscribed by the Act. Because Buckalew engaged in so many conversations with them during which such statements were made, however, it was not possible for Phelps and Booker to place precise dates of particular conversations. Therefore, counsel for the General Counsel does not seek a finding of a violation of the Act as to those conversations, and I make none. Be that as it may, this in no way detracts from the weight they are entitled to for purposes of assessing Respondent's animus toward unions and its motive for various actions taken here. As the record shows, however, similar statements were repeated often by Buckalew, by Plant Manager Flowers, by Plant-Manager-in-Training Hall, and by Kenneth McClain himself.

The credible evidence shows that as early as September 1994, Kenneth McClain began to approach employees, including Lawrence Trice, and interrogate them about union activity among employees. I credit Trice that even in these early conversations, McClain told him and other assembled employees he would close the Macon plant if necessary to avoid a union. Even more revealing, McClain was very specific about how he would do this. First, McClain pointed out that there wasn't anything in the Macon plant that could not be unbolted and moved by truck to another location. Second, McClain was very clear in telling employees that while moving the plant to avoid a union was against the law "he could slowly phase it out by making people think that the company was losing money." I find that by interrogating employees about their union sentiments, and the union sentiments of other employees, and by threatening plant closure if employees voted in a union, McClain violated Section 8(a)(1) of the Act. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985); and *Rossmore House*, 269 NLRB 1176 (1984).

Interrogation and threats continued at other times, as well. The record shows that in late October just before the petition was filed, at a time when employees were attempting to keep union activity secret, Kenneth McClain approached Thomas Booker and asked Booker if he knew anything about the Union. Further, in early November, at a time when Coats had not expressed any support for the Union or even signed a union authorization card, Kenneth McClain approached Larry Coats and questioned him about "why did we need a Union." McClain does not deny questioning Coats, and in fact admits questioning many employees about their support for the Union. I find that McClain interrogated employees about their union sympathies, and the sympathies of other employees, in violation of Section 8(a)(1) of the Act.

In addition to direct interrogation, Respondent also asked certain trusted employees to spy on other employees. In early November, Plant-Manager-in-Training Tim Hall asked Lawrence Trice and Keenan Castleberry if they wanted to drive over and see who was at a union meeting. They did, and Hall then let them off scheduled overtime work for this purpose. The next day, they reported to Hall a list of names they had recorded. The circumstances of this incident were fully litigated and is closely related to an identical allegation in the complaint with respect to McClain. Accordingly, I find that Respondent solicited employees to spy on the union activities of other employees, and Respondent thereby violated Section 8(a)(1) of the Act.

Interrogation appears to have ceased on November 3 when the Union filed its first petition in Case 10–RC–14566. Along with the petition, the Board's Regional Office also served on Respondent the list of employees' names who had signed authorization cards, which had been submitted by the Union in support of its petition. There can be little question that as a result of receiving this list, McClain knew who was involved, and interrogation would serve no further purpose.

While interrogation ceased once McClain knew who was actually involved, threats to close the Macon facility continued. Throughout December 1994, Respondent continued to convey the message to employees that Kenneth McClain would not tolerate a union and would close the Macon facility before he would allow that to happen. McClain held meetings with employees to discuss the Union. McClain warned that if the Union came in, friends would no longer be friends, that production would go down because there would be so much bickering, that he could not afford a union, and finally that if a union did come in, the plant "could close and pack up." Even this sometimes conditional phrasing is clearly coercive and unlawful, for McClain did not even suggest any objective basis outside Respondent's control for predicting closure. *Coradian Corp.*, 287 NLRB 1207 (1988).

McClain's message was repeated by supervisors as well. Plant-Manager-in-Training Tim Hall told Milton Craig that McClain had said he was going to close the plant if the Union got voted in. Thomas Walker overheard Al Buckalew tell a group of employees that McClain would close the plant if a Union got in. I find that Respondent repeatedly threatened employees with plant closure if they selected the Union to represent them, and Respondent thereby violated Section 8(a)(1) of the Act.

The record shows that McClain tried several times to endear himself to employees to dissuade them from supporting the Union by promising and granting various benefits. Early on, employee Lawrence Trice told McClain that he did not favor a union. Consequently, McClain assured Trice that if he did move the Company, he would make sure Trice could transfer. Further, McClain told Trice that he thought Trice was "on my side" and promised Trice a $1-per-hour raise. By both statements, McClain promised benefits in return for opposing a union, and Respondent thereby violated Section 8(a)(1) of the Act.

McClain promised and delivered other benefits as well. After the first petition was filed, McClain started having meetings with groups of employees to discuss the union issue. In one of the earliest of these meetings, McClain told employees he had heard that one of the reasons employees wanted a union was because of problems with management. McClain told employees they didn't need a union—that he could take care of their problems. McClain stated, "If you are dissatisfied, why didn't you let me know?" As a result, employees started expressing their need for a better

breakroom, a refrigerator, an ice cooler, a microwave, and similar items. Booker and Trice testified credibly that employees got everything they asked for in this meeting. I find that by these actions, McClain solicited grievances from employees and granted employees various benefits to dissuade them from supporting the Union, and Respondent thereby violated Section 8(a)(1) of the Act.

A few weeks after the first petition was filed, on November 22, McClain approached Aric Evans and told him "he wouldn't have a Union in his fucking shop," that nobody was going to tell him what to do in his shop and that "if you think I'm nasty now, just wait. I'll show you. You haven't begun to see nasty." Later that same day, McClain approached Office Manager Sara Kitchens and Evans; told Kitchens that, based on employees' past time records, she was to prepare disciplinary warnings for all employees who had violated company attendance policies; and directed Evans was to pass them out. When Lawrence Trice was given his warning, and complained to Plant-Manager-in-Training Tim Hall, Hall said he would take care of it, and tore up the warning. Later that same day, Kenneth McClain approached Trice and apologized for the writeup, admitting that warnings had been prepared for everybody "because we have to make the Union think we're going strictly by company policy." On that same day, Robbie Swayne was also given a written warning by Aric Evans at McClain's direction for past times he was tardy. Following an argument between McClain and his counsel about whether McClain could depart from past practices on the advent of the union campaign, Swayne's warning was also withdrawn.

The record shows conclusively that these warnings were motivated by McClain's desire to retaliate against employees who supported the Union. The record here clearly reflects McClain to be a successful yet volatile individual who is used to having his own way, and who, at least until now, has shown no reluctance to reveal the motive for his intended actions. This is certainly true with regard to these warnings, immediately prior to which McClain told Evans of his intention to get "nasty." McClain also revealed his retaliatory intent to Trice when he apologized to Trice for issuing him the warning and told Trice that warnings had been prepared for everybody "because we have to make the Union think we're going strictly by company policy." I find that McClain ordered warnings to be issued to employees in retaliation for their union activity, and Respondent thereby violated Section 8(a)(1) and (3) of the Act.

On November 18, a hearing was held in Case 10–RC–14566. Respondent argued that the unit petitioned for was not appropriate, and that the only appropriate unit should include the group of "temporary employees" employed by Image temporary services, who were in effect probationary employees of Respondent. On December 21, 1994, a Decision and Order issued dismissing the Union's petition in Case 10–RC–14566. Almost immediately, McClain held a series of meetings with employees in which he assured employees there would not be a layoff, and that if necessary to avoid one Respondent would "stock the yard if that's what it came to." When employees returned to work in January after the Christmas shutdown, McClain held another series of meetings in which he again assured employees that while work was slowing down, and as a result overtime would be cut, there would be no layoffs. McClain again told employees that if necessary, "we would stock pile stuff in the yard just to keep people working."

It is apparent that on January 12, when Respondent received the Union's second petition adding the temporary service employees to the unit, McClain decided making promises to employees had not worked. McClain's anger at employees was shown within just a matter of days when McClain decided to change previous practice of allowing retests when someone tested positive for drugs. Obviously, neither the Board nor I in any way condone or excuse drug use by employees. On the other hand, there is no question that false results are sometimes possible, and even more important is the fact that Respondent quite clearly had a practice before the advent of union activity of allowing such retests. The record is equally clear in pin-pointing McClain's change in that policy. The Union's second petition was received by Respondent Thursday, January 12, and on the following Monday, January 16, McClain for the first time refused to allow retesting for employee Kenneth Swayne. Prior to this time, McClain had been quite tolerant not only in allowing retesting, but in allowing employees to rehabilitate themselves, as shown by the cases of Terry Dukes, Wanda McDonald, and Neil Flowers. Within just a few days of the second petition being filed, however, McClain decided to disallow retests. Shortly thereafter, he decided to require every employee in the plant to submit simultaneously to a drug screen, something which had never been done before.

Also within days of the Union filing its second petition, McClain reversed his promise to employees that there would be no layoff, and instead effectuated one immediately on January 18. Respondent has offered considerable evidence by which it tries to show an economic basis for this layoff. Even that, however, is suspect. In May 1993, McClain of Oklahoma, Inc. received an order from Baker Tanks, Inc. for certain watertight rolloff containers which were to be shipped to Sulfur, Louisiana. McClain decided that McClain of Oklahoma would send many of the orders to build these containers to McClain of Georgia and McClain of Ohio. McClain claims this was done because of a "freight issue," but shows no evidence it is cheaper to ship from Ohio to Louisiana than from Oklahoma, a much shorter distance. This suggests that other factors may have played a bigger role in this decision, such as a simple distribution of work. Be that as it may, McClain of Oklahoma sent a purchase order for the first time to McClain of Georgia in January 1994. At first, Baker Tank placed orders for a specific number of containers. Subsequently, Baker Tank told McClain representatives it would take as many containers as McClain could build.

Toward the end of 1994, however, Baker Tank orders began to slow down. McClain representatives questioned Baker Tank about the slowdown. Supposedly, the response was—don't worry, everything's fine—keep building the product. In fact, however, the last order from Baker Tank was dated November 15, 1994. It is undisputed that this last order was completed by McClain of Georgia on February 3, 1995. This, however, was definitely not the last order for such containers. As Respondent admits, McClain of Oklahoma received an order from Triad Transport, Inc. dated November 16, 1994, the very day after the last order from Baker Tank, for 100 more containers. As Respondent admits in its posttrial brief, this "allowed McClain of Oklahoma to avoid a layoff at this time." In fact the record shows there

was no layoff at any McClain facility other than the Macon facility. Yet Respondent has shown nothing to have occurred—at Macon or at any other facility—that was not already known to McClain in late December and early January when McClain promised employees there would be no layoff. As the record clearly shows, McClain did not receive any orders from Baker Tank after November 15, 1994, yet it was almost 6 weeks later that McClain stood before employees and promised that he would send work from other facilities if necessary to avoid a layoff at Macon. The only significant intervening event between that time and the layoff was the Union filing its second petition on January 9.

In the final analysis, the question is not whether the January layoff represented sound economic practice. The question is whether Respondent effected this layoff to retaliate against employees because of the Union, and whether Respondent would or would not have effected the layoff regardless of union activity. All the elements of an overwhelming prima facie case under *Wright Line*, 251 NLRB 1083 (1980), are present several times over. More virulent union animus is difficult to imagine, and McClain specifically told employees exactly how he could shift work either to keep them employed or to justify a shutdown or a layoff. The timing of the layoff is explicable only by receipt of the second petition, for McClain himself testified that he had been conversing for some time—up to four times a week—regarding the status of the Baker Tank orders which were coming to an end. Therefore, the only thing which can explain McClain's switch from an absolute commitment to no layoffs the week before the second petition was received, to mass layoffs the week following, is the Union. Further, in the Oklahoma plant, which was the principal center for the Baker tank work, no layoffs took place.

In the instant case, the record provides overwhelming evidence that even though this layoff might indeed have represented sound economic practice, it was not only effected to retaliate against employees, it would not have occurred but for the Union's second petition being filed. McClain had repeatedly assured employees just before the Christmas shutdown and again just after the New Year that there would be no layoff. McClain himself said that if necessary, work would be brought from other plants to keep employees working. Respondent has presented absolutely no evidence that anything occurred of an economic nature after McClain made those assurances to employees to necessitate a layoff. I find that McClain's change in the drug policy to disallow retests, the decision to require every employee in the plant to submit simultaneously to a drug screen, and the decision to lay off employees were motivated solely by McClain's desire to retaliate against employees because the Union had filed a second petition, and in doing so to attempt to dissuade employees from supporting the Union, and Respondent thereby violated Section 8(a)(1) and (3) of the Act. Accordingly, I also find that all employees adversely affected by the change in drug policy and the layoff were discriminated against in violation of Section 8(a)(1) and (3) of the Act. The Board has long recognized that employees discriminated against in this manner are eligible to vote in a Board-conducted election. Accordingly, it is ordered below that challenged voters who had been unlawfully laid off, or terminated by the change in drug screen policy, shall have their ballots opened and counted.

Further, the record convinces me that even if it were found the layoff was not unlawfully motivated, the laid-off employees had a reasonable expectation of recall and were eligible to vote in the Board-conducted election. Several employees testified credibly to McClains' remarks at the meeting concerning the length of the layoff and the possibility of laid-off employees being recalled. None of them agrees with McClain, who asserts he told employees he did not see any chance of laid-off employees getting their jobs back. I do not credit McClain. Lawrence Trice testified that McClain stated the layoff would last about 2 to 4 weeks. Alfred Phelps testified McClain stated that anybody laid off would be called back as soon as work picked back up. I have no doubt this is what McClain told employees, and I credit both Trice and Phelps. Further, the record shows that at least for some, the January 18 layoff in fact did not last long. Elijah Schinholster was rehired on January 23, 1995. Duran Jackson was rehired February 6, 1995. Both were rehired even before the election. I am convinced that McClain led the laid-off employees to believe the layoff was only temporary and would be relatively brief. Therefore, at the time of the layoff, employees had a reasonable expectation of recall, and were eligible to vote in the election conducted on February 23. Accordingly, it is ordered below that challenged voters who had been laid off shall have their ballots opened and counted.

The complaint alleges, and counsel for the General Counsel argues, that Respondent's changes in its recall policy with regard to retaining seniority for purposes of qualifying for fringe benefits, its new evaluation procedures, and its new and stricter attendance policies were effectuated unilaterally and without notification or bargaining with the Union. The record is clear that these were indeed changes made unilaterally. Counsel for the General Counsel argues that the changes therefore violate Section 8(a)(1) and (5) of the Act. Such a finding is, however, dependent on whether the Union obtains a majority of votes if and when the challenged ballots are opened. Accordingly, I make no finding of a violation of Section 8(a)(5) of the Act. What I do find, however, is that these changes are like and related to the other changes designed to retaliate against employees as discussed above, and therefore such changes violate Section 8(a)(1) and (3) of the Act. Further, employees adversely affected by such changes were unlawfully discriminated against in violation of Section 8(a)(1) and (3) of the Act.

While Aric Evans had nothing to do with initial union activity amongst employees, there is no question he unwittingly and unwillingly became a figure very central to both the Union's cause and Respondent's reaction. On October 12, just as union activity was beginning in earnest at Respondent's facility, leadman Timothy Hall became irate, stormed through Respondent's plant and out the door screaming that he "would not work for" or "would not take orders from a nigger," meaning Evans. As Kenneth McClain admits, he was "panicked" at the thought of losing Hall and "would have agreed to anything to get the man to come back to work . . . ." McClain sent someone to get Hall, then met with Hall and made him various promises in order to get Hall to come back to work, including a promise that Hall would be plant-manager-in-training for a new plant McClain planned to open.

McClain then met with Aric Evans, who had become recognized as the unofficial assistant plant manager, and Hall.

McClain told Evans he was putting Hall "over" Evans. Immediately after that meeting, McClain met with certain key employees at the facility, including supervisors, leadmen, Hall, Evans, and Evans' three nephews, Milton Craig, Cedric Craig, and Lance Craig. The record shows that the primary purpose of this meeting was to lay out for everyone involved the responsibility and authority of various people. McClain stated that Ken Cole was "plant manager—in the office" and Neil Flowers was "plant manager." McClain stated that Tim Hall would be assisting Flowers and training to be plant manager at the new Texas facility. McClain stated Aric Evans "would be assisting Cedric [Craig, a leadman] . . . in getting parts." Perhaps to appease Hall, or perhaps for some other reason, McClain went on to tell a would-be off-colored "joke" to illustrate and emphasize various peoples' position in Respondent's hierarchy. The "joke" ended with McClain comparing Aric Evans to an anus.

The next day, October 13, the Union held its first meeting with employees, at which time numerous employees, including Aric Evans, signed authorization cards. On November 3, the Union filed its first petition, in Case 10–RC–14566. Aric Evans' name was on the list of employees who had signed cards which was mistakenly served on Respondent by the Board's Regional Office. As a result of receiving this list, McClain not only knew who was involved, but no doubt drew his own conclusions about who was responsible.

Respondent argues that throughout the time relevant to this case, including while on night shift and on his return to the day shift, Evans was a supervisor within the meaning of the Act. The record convinces me that whatever may have been expected from Evans in spurring productivity, he was no longer a supervisor within the meaning of the Act after Hall was made plant-manager-in-training. The night shift consisted of only seven people, one of whom was the former plant manager. According to Respondent's own position, it did not ask Evans to go onto that shift, but rather Evans volunteered. If Respondent did not ask Evans to go on night shift, but it clearly did ask former Plant Manager Buckalew, given the fact there were only six other people on the shift, there is simply no reason to believe anyone other than Buckalew actually possessed any supervisory authority.

Respondent argues that when Evans was returned to the day shift, he was placed in a supervisory capacity "in charge of the machine shop." Plant Manager Flowers himself testified, however, that McClain wanted Evans back on the day shift to "keep track of steel" and "help Cedric." Cedric is Evans' nephew and himself only a leadman. Further, Flowers testified that the day Evans returned to the day shift and McClain sent Evans home while he considered firing Evans, McClain asked Flowers "if Evans was worth saving to the plant." It was only because Flowers and other employees supported Evans that he was retained at all. I conclude that while Evans may indeed have been uniquely capable of helping other employees spur productivity, Evans actually possessed no supervisory authority within the meaning of the Act. To the extent Evans played any role in spurring productivity among other employees, I find that it was as nothing more than a leadman, if in fact he had even that authority. McClain had indeed revealed his own view of Evans in the tasteless off-colored "joke" in which he equated Evans with an anus.

On November 18, at the hearing held in Case 10–RC–14566, Ken Cole identified Aric Evans as assistant plant manager. On the basis of that testimony, the Union stipulated that Evans was excluded from the bargaining unit as a supervisor. Not only is this stipulation not binding on me, but under these particular circumstances it is also of little significance. Cole simply identified certain people by supposed position, with no description whatever of their actual duties. Further, the events of November 22, just 4 days later, strongly suggest that Respondent was simply laying the groundwork for denying Aric Evans the ability to influence other employees to support the Union, and perhaps even the groundwork to take action against Evans for doing so.

It was on November 22 that Respondent's counsel met privately with Evans, questioned Evans about what started the Union, told Evans that he could not have anything to do with the Union because he was assistant plant manager. Evans pointed out as evidence that he was not a supervisor both the fact McClain had told him he "wasn't shit" and the added fact he was not on salary, as were other supervisors, including Plant-Manager-in-Training Hall. Even after Evans denied that he held any supervisory position, Respondent's counsel questioned Evans about the union activity among employees, including specific employees. Counsel for the General Counsel seeks no finding that Respondent's counsel violated the Act, and I therefore make none. I do, however, note that only about a week after that meeting, McClain approached Evans and told him that he was putting Evans on salary. Even when Evans protested, McClain responded by cursing Evans and stating he was putting Evans on salary anyway. The record here paints a very clear picture that Aric Evans was looked up to and respected by rank-and-file employees, and Kenneth McClain was very much aware of this. The record is equally clear that Respondent made every effort to use this to its advantage, both in getting the work out and in the union campaign. Both the circumstances and the timing reveal that Respondent tried to create the appearance of Aric Evans being a supervisor in order to prevent him from influencing other employees to support the Union. Conversely, it is equally apparent that Kenneth McClain tried to manipulate Evans to discourage employees from supporting the Union in any way possible, including unlawful conduct, as more fully described below.

It was also on November 22 that McClain approached Aric Evans and told him "he wouldn't have a Union in his fucking shop," that nobody was going to tell him what to do in his shop and that "if you think I'm nasty now, just wait. I'll show you. You haven't begun to see nasty." A short time later that same day, McClain assigned Office Manager Sara Kitchens to prepare disciplinary warnings based on employees' past time records for everyone who had violated company attendance policies, and Evans was to pass them out.

Evans testified credibly that right after the meeting between him and Respondent's counsel, described above, Evans was made an inventory clerk, ordering needed parts and supplies, and keeping track of such items on the computer in Respondent's office. Evans also testified credibly that McClain told him the only thing Evans was responsible for was making sure the men had all the parts they needed. At the same time, not long after that meeting with Respondent's counsel, McClain approached Evans and told him that

he was putting Evans on salary, which he did even over Evans' objection. In fact, it is clear that despite being converted to salaried status, Evans' actual authority was no more than, and in many ways less than the bargaining unit leadmen, for Evans was put to assisting leadman Cedric Craig in getting parts. Further, it is apparent that whenever substantive decisions were made, Evans played no part in them. For example, although he was required to hand out reprimands to employees, he had nothing to do either with the decision to issue the reprimands or to rescind them. Nor was he permitted any role in the layoff decisions.

It is evident that McClain was acutely aware of the respect other employees had for Aric Evans. On Wednesday, January 18, McClain laid-off numerous employees. Immediately thereafter, McClain approached Evans privately in the office. McClain told Evans that he wanted Evans to go out on the floor, and tell the people who supported the Union, "I will close the doors and I advise you let them know I'm not playing—I don't play games . . . I will." McClain told Evans, "You can tell them in your own way." McClain then continued, "That's what happened in Kalamazoo . . . better check the records . . . I won't have nobody tell me how to run my business." Evans testified credibly that as McClain was saying this, "I was shaking my head, no, I wasn't going to do it."

When employees returned to work in January after the Christmas layoff, Aric Evans was placed "in charge of the floor." The record also shows that during these times when Evans was "in charge of the floor" some of his duties included assigning work to other employees. This assignment of work is the only indicia of supervisory authority Evans ever exercised. Further, the vast majority of these duties were of a leadman nature, including hands-on work showing others how to do certain things. Aric Evans casual use of the term "supervising" throughout this proceeding is immaterial to whether he was a supervisor within the meaning of the Act, for the term was introduced by counsel, and it is clear from the context that both were using it loosely to encompass mere leadman duties.

McClain telephoned Evans about a week after the layoff and asked whether Evans thought that employee union morale was still strong. Evans replied yes, that support for the Union had not changed, and people still wanted the Union. McClain then said that with Neil Flowers and Tim Hall both gone at that time, "I guess you're in charge." Evans replied, "No, Sir, I don't know anything about it." McClain repeated, "Well, I guess you're in charge," and hung up. About a week after this phone conversation, however, after Evans told McClain that employee support for the Union was still high, McClain again changed Evans' duties. McClain approached Evans and told him he had a job he wanted Evans to do. McClain then stated that he wanted the whole plant cleaned up—the shop as well as the yard. McClain told Evans that if he did not have the whole job done in 2 weeks, Evans "ass would be out the door." Evans replied that he would have to take some people off the line to get the job done in time. McClain responded that Evans could not do so—that he had to do the job at night and only with volunteers. This is further evidence of Evans lack of any real supervisory authority, and at the same time the respect which he had from other employees. Evans was able to get five or six people to volunteer to help him, and together they got the job done.

On February 22, the day before the Board-conducted election, McClain discharged Evans. When Evans asked why he was being fired, McClain first responded, "Don't worry about it. Don't worry about it." When Evans insisted on a reason, McClain claimed that Evans had threatened to shoot someone. When Evans protested, McClain answered, "That's right. You don't threaten nobody. Just get the hell out. You're fired. You just get on out of here." Evans asked, "Who did I threaten, Mr. McClain? Who am I threatening?" McClain again tried to evade the issue, answering, "Don't worry about it. Don't worry about it. Just get on out of here." Then as Evans was leaving and got to the door, McClain stated, "And I know you're the reason this shit is in my shop." There can be little question that McClain's statement was a thinly veiled reference to the union campaign. Even as he was getting rid of Evans just before the election, McClain tried to cover all his bets by telling Evans that he might call him back. Evans replied, "Well am I fired or not?" McClain retorted, "Yeah, you're fired. Get the fuck out of my shop." Evans left.

To summarize, the record reflects that prior to the advent of union activity, Aric Evans had come to be recognized as the unofficial assistant plant manager. No doubt this was in large part due to his ability to get along well with the work force and thereby spur productivity. There is absolutely no evidence, however, that Evans ever had authority to hire, fire, promote, suspend, reward, reprimand, or even grant time off to employees. What Evans did do at that time was assign work in a manner which was routinely followed by other employees. This changed dramatically on October 12, 1994, when leadman Tim Hall unequivocally refused "to take orders from a nigger" and walked off the job. McClain admits that he was "panicked" by this and "would have agreed to anything to get the man to come back to work." The record convinces me that what McClain did was not just promote Hall but demote Evans in order to appease Hall. McClain intentionally made this clear when he compared Evans to an anus. I find that from that moment on, whatever may have been expected from Evans in spurring productivity, he was no longer a supervisor within the meaning of the Act after Hall was made plant-manager-in-training. The record shows that at various times thereafter, Evans was placed "in charge of the machine shop," primarily because the shop went into quick disarray without him. While Respondent argues that his is clear evidence of supervisory status, I find the testimony of Plant Manager Flowers to be especially revealing in describing Evans actual duties as "watch[ing] the material . . . keeping steel in there . . . and work[ing] with Cedric in every way he could to help Cedric pull the material through fabrication."

Once the first petition was filed, McClain found himself in a particularly ticklish situation. No sooner had he promoted Hall and demoted Evans, than he received the first petition along with the list of card signers which included Evans. Officially Respondent took the position that Evans was assistant plant manager, a supervisor who it could preclude from engaging in union activity, while unofficially McClain made it clear to Evans repeatedly that he "wasn't shit in the shop." Throughout the union campaign and throughout this proceeding, Respondent has tried to walk this

thin line and have it both ways for its own benefit. When Respondent's counsel met privately with Evans and learned that Evans was not even salaried, as were real supervisors including Tim Hall, it was only a matter of days before Evans was placed on salary.

It is evident that McClain was acutely aware of the respect other employees had for Aric Evans, tried to use this to his own advantage as much as possible to defeat the Union, and became angry when Evans refused to cooperate. On the same day McClain effected the sizable layoff of employees, McClain directed Evans privately to advise the remaining employees he was "not playing games" when he threatened to close the shop rather than let employees go union. When Evans refused, and later confirmed that employee support for the Union was still high, it was only a matter of days that McClain assigned Evans to get the whole shop cleaned up or be "out the door."

On February 22, the day before the Board-conducted election, McClain fired Evans. Based on Evans' credible testimony, I find that Evans was fired during the conversations immediately before he was sent home, not at a later time as claimed by McClain. It would have been extremely difficult for McClain to find a more dramatic way to impress on employees that indeed he was "not playing games." McClain cites various instances of Evans supposedly not getting along with other employees as the basis for firing Evans. He even accuses Evans of being responsible for not getting along with Hall, who walked off the job refusing to take orders from "a nigger." As it developed in later testimony, almost every instance of Evans supposedly not getting along with other employees came to McClain's attention after Evans was fired on February 22. That is precisely why McClain claims Evans was not really fired until later. On the subject of Evans being sent home on February 22, McClain pointed to nothing specific until his counsel finally probed with leading questions. Only then did McClain address the issue of supposed threats.

McClain's testimony concerning supposed threats can only be described as silly, if not laughable. According to McClain's interpretation, Evans threatened violence, and perhaps murder at Respondent's facility, in a conversation with Plant Manager Neil Flowers. Even his own testimony does not support that interpretation. Evans and Plant Manager Flowers were discussing rumors about employees bringing guns to work. Flowers said something to the effect that due to his laid-back Oklahoma attitude, no one was going to bring a gun to work. Evans responded something to the effect that that was what they said at the Post Office too. Evans is also supposed to have said, "When your time is up, your time is up," or words to that effect. According to McClain, this was reported to him by Flowers, and "[i]t just absolutely petrified me."

Flowers' description of the conversation with Evans was remarkably casual, not in any way conveying a threatening interpretation such as that suggested by McClain. In fact, only the most contorted interpretation of Evans purported remark could carry that connotation. It is apparent from the context of the conversation as described by Flowers that Evans was expressing a concern about an employee bringing a gun to work, not condoning such conduct. It was Flowers who proffered the suggestion that no one would do this because of his laid-back Oklahoma attitude. Evans' immediate remark about the Post Office simply implied that perhaps Flowers was being naive. His next remark, even assuming he made it, about one's time being up, in no way suggests Evans was condoning violence, much less threatening it himself. The remark conveys nothing more than a fatalistic philosophical acceptance that certain things are beyond our control—most particularly the moment of our own death. For McClain to interpret this as a threat by Evans requires an intentionally contorted misinterpretation. The further fact that McClain did not even bother to confront Evans to give him any chance to explain the remark, even assuming he made it, when viewed in the context of McClain's rampant antiunion animus, demonstrates that McClain's real motive was simply his desire to rid himself on the eve of the election of the one person who McClain saw as most responsible. I find that Respondent discharged Evans in violation of Section 8(a)(1) and (3) of the Act. Further, even if Evans were deemed to be a supervisor, the circumstances and timing of Evans' discharge show that Evans' refusal to help McClain defeat the Union by every possible means including threatening plant closure motivated the discharge. Therefore, Evans discharge is unlawful regardless of his status. *Phoenix Newspapers*, 294 NLRB 47 (1989); and *Parker-Robb Chevrolet*, 262 NLRB 402 (1982).

CONCLUSIONS OF LAW

1. The Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating employees about their union sympathies, and the sympathies of other employees, Respondent violated Section 8(a)(1) of the Act.

4. By threatening employees with plant closure if they selected the Union to represent them, Respondent violated Section 8(a)(1) of the Act.

5. By soliciting employees to spy on the union activities of other employees, Respondent violated Section 8(a)(1) of the Act.

6. By soliciting grievances from employees, promising benefits to employees in return for opposing the Union, and granting employees various benefits to dissuade them from supporting the Union, Respondent violated Section 8(a)(1) of the Act.

7. By ordering warnings to be issued to employees in retaliation for their union activity, and by issuing such warnings, Respondent violated Section 8(a)(1) and (3) of the Act.

8. By changing its previous practice of allowing retests when someone tested positive for drugs in order to retaliate against employees because of their support of the Union, Respondent violated Section 8(a)(1) and (3) of the Act.

9. By requiring every employee in the plant to submit simultaneously to a drug screening in order to retaliate against employees because of their support of the Union, Respondent violated Section 8(a)(1) and (3) of the Act.

10. By laying off employees to retaliate against them because of their support for the Union and to attempt to dissuade employees from supporting the Union, Respondent violated Section 8(a)(1) and (3) of the Act.

11. By changing its recall policy with regard to retaining seniority for purposes of qualifying for fringe benefits,

changing its evaluation procedures, and instituting new and stricter attendance policies in order to retaliate against employees because of their support of the Union, Respondent violated Section 8(a)(1) and (3) of the Act.

12. By converting employee Aric Evans from hourly to salaried status in order to try to remove Evans from the status of an employee protected by the Act, soliciting Evans to commit unfair labor practices, imposing more onerous working conditions and job duties on Evans, and discharging Evans because he refused to commit unfair labor practices, Respondent violated Section 8(a)(1) and (3) of the Act.

13. The unfair labor practices which Respondent has been found to have engaged in have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of the Act, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Board has long recognized that employees discriminated against in violation of the Act are eligible to vote in a Board-conducted election. Accordingly, it is ordered that challenged voters who had been unlawfully laid off, terminated by the change in drug screening policy, or discharged shall have their ballots opened and counted. Further, even if it were found the layoff in January 1995 was not unlawfully motivated, the laid-off employees had a reasonable expectation of recall and were eligible to vote in the Board-conducted election. It is, therefore, ordered that, under any circumstances, challenged voters who had been laid off shall have their ballots opened and counted.

After the challenged ballots described above are opened and counted, a revised tally of ballots shall issue. If it is determined as a result that a majority of votes have been cast for the Union, it shall immediately be certified by the Board. If a majority of votes have not been cast for the Union, then as a result of the unfair labor practices engaged in by Respondent here, on the basis of the objections filed by the Union, the first election shall be set aside and a second election conducted.

[Recommended Order omitted from publication.]